MOTION FILED
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No. 87-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

In the Matter of:
JEAN ANN CONE,
Petitioner

v.

THE FLORIDA BAR, ET AL,
Respondents.

MOTION AND BRIEF OF OHIO STATE BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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MOTION OF OHIO STATE BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

The Ohio State Bar Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Petitioner has been obtained. The consent of all Respondents has not been obtained but one Counsel, Michael Nachwalter, has consented.

INTEREST OF AMICUS

The Ohio State Bar Association is a voluntary association whose membership is open to all members of the Bar of Ohio. The organization has 18,500 members and is directed

and managed by a 21 member Executive Committee elected by the membership. This Motion and Brief was authorized by the Executive Committee.

The Ohio State Bar Association is concerned with the question involved herein as to the constitutionality of INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA). The State of Ohio has a statutory, mandatory IOLTA program requiring all lawyers receiving client's funds, which are nominal or short term in nature, to deposit the same in interest bearing accounts. The interest earned thereon is paid to the state treasurer. The funds are then distributed through the office of the Ohio Public Defender and, at the present time, are used solely to support the delivery of civil legal services to indigents.[1]

The Ohio State Bar Association is the only statewide organization of attorneys in Ohio open to all lawyers regardless of areas of practice or special interest.

The decision of the court below in this case upholds the constitutionality of the Florida IOLTA program. It is the only Federal Court of Appeals decision on the subject. This Court has not spoken on the subject.

This *amicus* suggests to the Court that clients and lawyers throughout America are vitally interested in having a decision of this Court so that all uncertainty (as to constitutionality) surrounding IOLTA programs will be removed.

As stated in Petitioner's Brief "Only this Court can resolve the question with finality."

REASON FOR GRANTING THE WRIT

This Court should grant Certiorari to review the decision of the court below for the reason that the Eleventh Circuit Court of Appeals has decided an important federal consti-

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[1]Ohio Revised Code Sections 4705.09 and 4705.10.

tutional question which has not been, but should be, settled by this Court. The case involves a matter of great general public concern.

ARGUMENT

The court below held that the Florida IOLTA program is constitutional in that the use of the interest earned on trust funds held by lawyers is not a taking of property.

A recent publication of the ABA/IOLTA Clearinghouse, "I.O.L.T.A. UPDATE" (Vol. 4 No. 3 Spring 1987) states that over 100 million dollars has been raised in six years and that there are now 44 operable IOLTA programs. These numbers alone make it obvious that this case involves a matter of great general public concern. The interest of the Ohio State Bar Association is in having this Court speak clearly on the subject of the constitutionality of IOLTA programs.

Lawyers presently face a real dilemma. That is, for example, in Ohio the Legislature has enacted a statute, signed by the Governor, mandating that lawyers comply with the IOLTA program. Failure to follow the law in Ohio would be a subject for discipline, as it would be in most states.

If in the future the Supreme Court of Ohio, the Sixth Circuit Court of Appeals, or this Court, decide that the statute is unconstitutional the lawyers of Ohio will be faced with considerable difficulties, similar to that of Respondent Holland and Knight. The finality of a decision of this Court can lay this issue to rest.

For these reasons this *amicus* requests the Court to grant the Petition for a Writ of Certiorari requested by Petitioner.

This *amicus* further wishes to inform the Court that, if the Petition for Certiorari is granted, it intends to join the Respondents in urging that this Court affirm the decision of the court below.

CONCLUSION

For the reasons set forth herein the Ohio State Bar Association joins in requesting this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. The interests of lawyers and the public would be best served if this Court addresses the issues in this important constitutional case.

Respectfully submitted,

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Proof of Service of
AMICUS CURIAE BRIEF

THE FLORIDA BAR, et al.,
Respondents

I hereby certify that on this _____ day of September, 1987, three (3) copies of the Motion and Brief of Ohio State Bar Association as Amicus Curiae were mailed, postage prepaid, to Herbert P. Schlanger, Attorney for Jean Ann Cone, Suite 900, 230 Peachtree Street, N.W., Atlanta, Georgia 30303, Thomas C. MacDonald, Jr., Attorney for Defendant, The Florida Bar Foundation, P.O. Box 3324, Tampa, Florida 33601, Michael Nachwalter, Attorney for Defendant, The Florida Bar, 400 Edward Ball Bldg., 100 Chopin Plaza, Miami, Florida 33232, F. Wallace Pope, Jr., Attorney for Defendant, Holland & Knight, P.O. Box 1368, Clearwater, Florida 33157 and Peter M. Siegel, Attorney for National IOLTA Clearinghouse, Florida Justice Institute, Inc., 100 N. Biscayne Blvd., Suite 3030, Miami, Florida 33132.

I further certify that all parties required to be served have been served.

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APPENDIX

§ 4705.09 of certain client funds in interest-bearing trust account]

(A)(1) Any person admitted to the practice of law in this state by order of the supreme court in accordance with its prescribed and published rules, or any law firm or legal professional association may establish and maintain an interest-bearing trust account, for purposes of depositing client funds held by the attorney, firm, or association that are nominal in amount or are to be held by the attorney, firm, or association for a short period of time, with any bank or savings and loan association that is authorized to do business in this state and is insured by the federal deposit insurance corporation, or any deposit guaranty association organized under sections 1151.80 to 1151.86 of the Revised Code. Each account established under this division shall be in the name of the attorney, firm, or association that established and is maintaining it and shall be identified as a trust account. The name of the account may contain additional identifying features to distinguish it from other trust accounts established and maintained by the attorney, firm, or association.

(2) Each attorney who receives funds belonging to a client shall do one of the following:

(a) Establish and maintain one or more interest-bearing trust accounts in accordance with division (A)(1) of this section or maintain one or more interest-bearing trust accounts previously established in accordance with that division, and deposit all client funds held that are nominal in amount or are to be held by the attorney for a short period of time in the account or accounts;

(b) If the attorney is affiliated with a law firm or legal professional association, comply with division (A)(2)(a) of this section or deposit all client funds held that are nominal in amount or are to be held by the attorney for a short period of time in one or more interest-bearing trust

accounts established and maintained by the firm or association in accordance with division (A)(1) of this section.

(3) No funds belonging to any attorney, firm, or legal professional association shall be deposited in any interest-bearing trust account established under division (A)(1) or (2) of this section, except that funds sufficient to pay depository institution service charges in excess of earnings on the account shall be deposited in the account and other funds belonging to the attorney, firm, or association may be deposited as authorized by the Code of Professional Responsibility adopted by the supreme court. The determinations of whether funds held are nominal or more than nominal in amount and of whether funds are to be held for a short period or longer than a short period of time rests in the sound judgment of the particular attorney. No imputation of professional misconduct shall arise from the attorney's exercise of judgment in these matters.

(B) All interest earned on funds deposited in an interest-bearing trust account established under division (A)(1) or (2) of this section shall be transmitted to the treasurer of state for deposit in the legal aid fund established under section 120.52 of the Revised Code. No part of the interest earned on funds deposited in an interest-bearing trust account established under division (A)(1) or (2) of this section shall be paid to, or inure to the benefit of, the attorney, the attorney's law firm or legal professional association, the client or other person who owns or has a beneficial ownership of the funds deposited, or any other person other than in accordance with this section, section 4705.10, and sections 120.51 to 120.55 of the Revised Code.

(C) No liability arising out of any act or omission by any attorney, law firm, or legal professional association with respect to any interest-bearing trust account established under division (A)(1) or (2) of this section shall be imputed to the depository institution.

(D) The supreme court may adopt and enforce rules of professional conduct that pertain to the use, by attorneys, law firms, or legal professional associations, of interest-bearing trust accounts established under division (A)(1) or (2) of this section, and that pertain to the enforcement of division (A)(2) of this section. Any rules adopted by the supreme court under this authority shall conform to the provisions of this section, section 4705.10, and sections 120.51 to 120.55 of the Revised Code.

§ 4705.10 [Criteria for accounts; duties of depository.]

(A) An interest-bearing trust account established under authority of section 4705.09 of the Revised Code shall comply with all of the following:

(1) All funds in the account shall be subject to withdrawal upon request and without delay, or as soon as is permitted by federal law;

(2) The rate of interest payable on the account shall not be less than the rate paid by the depository institution to regular, nonattorney depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity qualifications, such as those offered in the form of certificates or deposit, may be obtained by a person or law firm establishing such an account if there is no impairment of the right to withdraw or transfer principal immediately.

(3) The depository institution shall be directed, by the person or law firm establishing such an account, to do all of the following:

(a) Remit interest or dividends, whichever is applicable, on the average monthly balance in the account or as otherwise computed in accordance with the institution's standard accounting practice, less reasonable service charges, to the treasurer of state at least quarterly for deposit in the legal aid fund established under section 120.52 of the Revised Code;

(b) Transmit to the treasurer of state, the state public defender, and the depositing attorney, law firm, or legal professional association, at the time of each remittance required by division (A)(3)(a) of this section, a statement showing the name of the attorney for whom or the law firm or legal professional association for which the remittance is sent, the rate of interest applied, the accounting period, the net amount remitted to the treasurer of state for each account, the total remitted, the average account balance for each month of the period for which the report is made, and the amount deducted for service charges.

(B) The statements and reports made under division (A)(3) of this section are confidential and shall be used only for purposes of administering the legal aid fund.